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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD EUGENE CROSS,

Defendant and Appellant.

C061005

(Super. Ct. No.  
CRF08188)

Defendant Donald Eugene Cross pled no contest to vehicle theft (Veh. Code, § 10851, subd. (a)) in exchange for the dismissal of four other charges and a three-year sentence lid. The stipulated factual basis for his plea was a police report showing that defendant took the victim's car on April 6, 2008, with the intent to permanently or temporarily deprive her of its use and possession.

The probation report stated that defendant had served a prison term and had violated his probation and his parole several times. At sentencing, defendant did not object to the facts stated in the probation report. Therefore, the trial

court could accept them as true. (See *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.)

The trial court imposed the upper term of three years in state prison because of defendant's "recidivist behavior." Defendant timely filed this appeal.

On appeal, defendant contends imposing an upper-term sentence based on recidivism violates his Sixth Amendment rights as articulated in *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*) and related cases. He acknowledges that we are bound to reject his claim.

The California Supreme Court has held that a defendant's recidivism may be used to impose the upper term. (*People v. Black* (2008) 41 Cal.4th 799, 816-817; see also *People v. Garcia* (2008) 159 Cal.App.4th 163, 172-173.) Accordingly, we reject defendant's *Cunningham* claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

#### **DISPOSITION**

The judgment is affirmed.

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RAYE, J.

We concur:

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SIMS, Acting P. J.

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CANTIL-SAKAUYE, J.